Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

GERALD J. McLAMB, PETITIONER

v.

STATE OF ARIZONA, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court for the State of Arizona

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PETITION FOR A WRIT OF CERTIORARI

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55 pp

1. Does a criminal conviction for wearing a policeman's patch at a public gun show booth violate PETITIONER'S First Amendment right of political free speech, where PETITIONER, a retired/disabled policeman, wore the patch as part of his political protest of federal gun policies?

2. Is the Phoenix City Code Section which prohibits the unauthorized wearing of police insignia void for vagueness on its face or as applied to PETITIONER'S political protest?

3. Was the criminal prosecution against PETITIONER selective and discriminatory, in violation of PETITIONER'S First Amendment political protest and Fifth and Fourteenth Amendment due process and equal protection rights, where PETITIONER had a long history of political protest and litigation with the Phoenix Police Department and was the first ever prosecuted under the subject Phoenix City ordinance?

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PETITION FOR WRIT OF CERTIORARI

The PETITIONER, GERALD J. McLAMB (PETITIONER), respectfully requests that a Writ of Certiorari be issued to review the judgment of the Arizona Supreme Court and the Arizona Court of Appeals; the Arizona Supreme Court refused to review the judgment and opinion of the Arizona Court of Appeals.

OPINION BELOW

State of Arizona v. Gerald McLamb, Arizona Supreme Court No. CR-96-0624-PR, unpublished decision filed February 26, 1997, refusal to review the opinion of the Arizona Court of Appeals, Appendix A. State of Arizona v. Gerald McLamb, 932 P.2d 266 (AZ App. 1996), opinion filed September 17, 1996, Appendix B.

JURISDICTION

On February 26, 1997, the Arizona Supreme Court refused to review the judgment and opinion of the Arizona Court of Appeals (Division One). This petition is timely pursuant to Rule 13 of this court: postmarked by First Class Mail no later than 90 days from February 26, 1997. This court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law at issue are the United States Constitution, First Amendment - free speech, peaceful assembly, association, and petition for redress of grievances; the Fifth Amendment and Fourteenth Amendment -

right to due process of law and equal protection under the law, respectively (free from prosecution of vague statutes and from selective and discriminatory prosecution) and the Phoenix City Code § 23-21.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process f law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Phoenix City Code § 23-21 provides:

> Wearing Badges or Insignia of Officials.
> It shall be unlawful for any person to wear a firemen's or policemen's badge or insignia, or insignia of any public officer or inspector of the City when not properly authorized to wear such badge or insignia.

STATEMENT OF THE CASE

I. PROCEDURE

On December 12, 1993, PETITIONER, a retired/disabled Phoenix, Arizona police officer, engaged in political protest by operating a booth at a gun show in Phoenix. To gain attention to his cause

and as an important and theatrical part of his political protest, PETITIONER wore a police officer uniform, including Phoenix Police Department shoulder patches for which he was prosecuted by the city for impersonating a police officer, for which he was acquitted, and for wearing the insignia, for which he was convicted in Phoenix Municipal Court under Phoenix Code Section 23-21. The conviction was affirmed by the Maricopa County Superior Court and by written opinion by the Arizona Court of Appeals, Division I on September 17, 1996. On February 26, 1997, the Arizona Supreme Court refused to review the judgment and decision of the Arizona Court of Appeals.

Under Rule 10 of this Court's Rules, PETITIONER has filed this petition because the Arizona Court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this court regarding First Amendment protection of political protest, including wearing of military or police uniform insignias and other symbols, and flag desecration cases. See especially, Schacht v. U.S., 398 US 58 (1970)(army uniform worn in protest of Vietnam War; First Amendment protection).

II. OVERVIEW OF THE FACTS

PETITIONER, nationally known[1] for

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[1] As PETITIONER testified at trial, PETITIONER and Army Colonel (retired) BO GRITZ were successful in convincing RANDY WEAVER to surrender to FBI agents who had shot and killed his wife (in a doorway as she held her infant daughter) and fourteen year old son (in the back). The incident

protest of government policies and procedures, especially those dealing with the right to bear arms, has a long history of political protest and dispute/litigation with the Phoenix Police Department. For example, prior to his disability retirement in 1986, PETITIONER published a newsletter "Aid and Abet" directed to law enforcement officers, which newsletter expressed a purpose of "educating [law enforcement officers] concerning constitutional issues." PETITIONER was fired by the department for his refusal to obey an order to turn over his newsletter mailing list. PETITIONER claimed violation of his First Amendment rights and was reinstated by an appeals board. In 1993, PETITIONER helped form an organization called "Police Against the New World Order," and during the subject gun show he hung booth banners declaring "Police Against the New World Order," "Please Support Your Right To Bear Arms," and "We Will Not Take Your Guns Away."

As part of his political protest, PETITIONER wore what he called his "retirement uniform" which consisted of a PPD shirt on which he wore shoulder patches with the official department insignia. At the gun show, PETITIONER distributed his "Aid and Abet" newsletter and advertised the sale of his manual entitled "Operation Vampire Killer 2000."

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and PETITIONER'S role received nation-wide attention.

III. CHRONOLOGY

A. Protected Activities At The Gun Show

PETITIONER made political speeches in a booth at a gun show on Saturday and Sunday, December 11 and 12, 1993. His speech also included pamphlets, banners, and symbols. Among his pamphlets were newsletters that discussed the experiences and opinions of policemen (active and retired) who support the ordinary citizen's rights to keep and bear arms. Implicit in these political statements was a protest against all police departments and officials who advocate disarming non-police or non-military citizens.

Symbols that are central to this appeal were displayed by PETITIONER. He wore a dark blue shirt that had been part of his uniform when he was an active duty policeman with the Phoenix Police Department (DEPARTMENT). Disabled in the line of duty, he retired from the Department in 1986. On each shoulder of the shirt was a patch that contained the current official DEPARTMENT insignia. Above the left chest pocket was a "flat" badge indicating that PETITIONER was a retired policeman. He had received the badge upon his retirement from the DEPARTMENT. Other symbols on the shirt included a button containing the words "Question Authority," another button containing the words "POW/MIA", and a whistle of the type often carried by motorcycle officers. Defense Exhibit 1, State's Exhibits 1-4, Tr. 57 et seq.

LUNDBERG), Tr. 300 et seq. (PETITIONER).[2]

Two off-duty Phoenix police officers, ROBERTS and GUZMAN, came by PETITIONER'S booth at the gun show on Saturday, December 11. Tr. 462 et seq. They wondered between themselves whether it was legal for PETITIONER to be wearing the apparel, although they were not aware of a city ordinance or DEPARTMENT policy addressing the matter. Later, Officer ROBERTS called his precinct office (the Central City precinct), spoke to Lieutenant JOHN HUMPHREY and Sergeant PATRICK MELVIN, and described what he had seen at the gun show. Sgt. MELVIN made a written notation of the conversation and also discussed the subject with Lieutenant JOHN HUMPHREY. Tr. 468 et seq.

The next morning Lt. HUMPHREY told Sergeant TED MUSIC that there was a person at a gun show either impersonating an officer or wearing a Phoenix police officer's uniform. Tr. 446 et seq. Lt. HUMPHREY directed Sgt. MUSIC to accompany him to police headquarters to discuss the matter with the duty chief, Assistant Chief BREWSTER. In their meeting, Chief BREWSTER explained that he had already received a report of the matter. Then he handed a memorandum to Lt. HUMPHREY and Sgt. MUSIC. Chief BREWSTER also indicated that he had already discussed the matter with the city legal staff, and, upon that basis, directed Sgt. MUSIC to enforce the city ordinance. Tr. 453. Interestingly, this was the only occasion that Sgt. MUSIC had ever met with a duty chief to discuss enforcing the city

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[2]Reference to the Court Reporter's Transcript of Proceedings.

ordinance regulating wearing police insignia. Tr. 451.

On the way out of police headquarters, Sgt. MUSIC encountered Officer DAVID LUNDBERG, whom Sgt. MUSIC directed to accompany him to the gun show. Tr. 453. Upon arrival at the show, Sgt. MUSIC asked a person in charge of the show if PETITIONER was present, whereupon he learned that PETITIONER was present in a booth. Tr. 459. Obviously, Sgt. MUSIC knew PETITIONER and anticipated PETITIONER was the person he was seeking.

Sgt. MUSIC and Officer LUNDBERG approached PETITIONER at his booth. Tr. 93. Sgt. MUSIC then ordered PETITIONER to remove the shirt containing the political symbols. Tr. 95, 440, 454. When PETITIONER refused on First Amendment grounds, Sgt. MUSIC directed Officer Lundberg to issue two citations to PETITIONER for violating another code section (impersonating a police officer) and 23-21 (wearing Phoenix police patches). Tr. 96-97. Officer LUNDBERG then issued PETITIONER the citations that formed the original complaint in this case.

B. Procedural Setting

During the pre-trial stages, the charge of violating City Code § 23-20 was dismissed and replaced with a charge of violating state law, A.R.S. 13-2406, impersonating a police officer. Tr. 77. The trial testimony was replete with evidence that PETITIONER was presenting himself as a retired Phoenix Police officer espousing political views of his own and other like-minded persons, not necessarily those of any police officer

or other organization. See, e.g. testimony of Sgt. MUSIC, Tr. 101-103, Officer R. GARRABRANTS, Tr. 224, et seq., R. DALTON, Tr. 196-200, and T. HUEBNER, Tr. 210-212. The trial court found that PETITIONER was not guilty of the charge of violating A.R.S § 12-2406. Tr. 417. However, the trial court ruled that PETITIONER had violated City Code § 23-21 by wearing the police patches on the shirt shoulders. Tr. 419. The court imposed a fine of $79. Tr. 555. Subsequently, the court granted PETITIONER an evidentiary hearing on his pre-trial motion to dismiss for selective and discriminatory prosecution. Tr. 420. After the evidentiary hearing the trial court denied PETITIONER'S motion. Tr. 553.

REASONS FOR GRANTING THE PETITION

I. THE ARIZONA COURT OF APPEALS ERRED WHEN IT HELD THE CONVICTION DID NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHTS; EXPRESSIVE POLITICAL CONDUCT IS ENTITLED TO FULL CONSTITUTIONAL PROTECTION.

A. The Court of Appeals Decision

The Court of Appeals, at page 14 of its Opinion, recognized that, "(w)earing an official Phoenix Police Department insignia in the context in which the defendant was wearing it was expressive conduct." Despite this acknowledgement, the Court went on to state that, "the ordinance is not related to the suppression of free expression." This paradoxical conclusion is simply not borne out by the facts: PETITIONER'S free expression was suppressed when he

was cited for no other reason than engaging in free expression. Incredibly, the Court of Appeals placed its imprimatur on an ordinance that completely prohibits admittedly expressive conduct. The First Amendment protections at issue here: (1) free (political/symbolic) speech; (2) peaceful assembly (a gun show); (3) association (gun show displayers and attendees); and (4) petition for redress of grievances ("Police Against the New World Order").

B. The First Amendment Protects Wearing of Military Uniform as Part of Vietnam War Protest

First, PETITIONER respectfully directs the court's attention to Schacht v. U.S., 398 U.S. 58 (1970), a case of special pertinence to the present matter. In Schacht, the defendant wore a U.S. military uniform in a skit performed in front of an armed services induction center. The skit, a protest against U.S. involvement in Vietnam, represented U.S. soldiers killing a pregnant Vietnamese woman. Unauthorized wearing of U.S. military uniforms was prohibited by a federal statute, although there was an exception for wearing them in theatrical productions that did not discredit the armed forces. This Court found that the informal skit was a theatrical production within the meaning of the statute, striking down the proviso that the production not discredit the armed forces as an impermissible restraint on free speech in violation of the First Amendment.

Thus, under the Arizona courts' view, had PETITIONER worn the uniform and patches as part of a satirical skit in

the streets of downtown Phoenix, as opposed to a public gun show booth, PETITIONER would receive no protection from the First Amendment or this court. All of this despite this court's holding in Schacht decided over 25 years ago. And PETITIONER repeatedly relied upon Schact, beginning with his Motion to Dismiss on First Amendment grounds filed with the trial court.

C. The First Amendment Protects Symbols and Protest Activities

This Court has long recognized that the First Amendment forbids the abridgement of not only spoken and written speech, but of conduct or symbolic speech which poses sufficient communicative elements to convey a particularized message to the public. The notion that the First Amendment protects symbolic speech has been recognized by this Court as early as 1931. In Stromberg v. California, 283 U.S. 359 (1931), this Court applied First Amendment protection to displaying a red flag. Twelve years later, in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), this Court, recognizing the expressive nature of certain actions, held that public school children could not be compelled to salute an American flag. Then, again in Brown v. Louisiana, 383 U.S. 131 (1966), this Court emphasized that First Amendment rights "are not confined to verbal expression [but] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest...unconstitutional segregation of public facilities." *Id.* at 142 (footnote

omitted). In Brown, this Court prohibited state punishment of black students for peaceful sit-ins in a segregated library.

D. The First Amendment Protects American Flag Desecration

In Street v. New York, 394 U.S. 576 (1969), this Court overturned the conviction of Street, who had burned a personally-owned flag while casting aspersions toward it on a street corner in New York. The Court avoided addressing the symbolic speech aspects of the case by resting its decision on the First Amendment protection afforded verbal expression, and because the record made it possible to conclude that Street was convicted on the basis of his words alone.

In Spence v. Washington, 418 U.S. 405 (1974), the defendant was convicted under the "improper use" provision of the state's flag desecration statute. Spence had affixed certain symbols to a personally-owned flag and displayed the flag upside down in the window of his apartment. This Court looked at not only the physical acts but also at the context in which the acts occurred. Then, finding from the context that Spence was both intending and likely to communicate a message, this Court looked at the state statute under which he was convicted and the state interest furthered by that statute. Spence's conviction was overturned because the statute infringed protected speech activities.

The Court overturned another flag desecration conviction in Smith v. Goguen, 418 U.S. 566 (1974), but avoided the symbolic speech aspect of the case. Rather, the Court struck the statute on

the basis that it was void for vagueness. The defendant, Spence, wore a small flag sewn to the seat of his trousers and was convicted under a Massachusetts flag misuse statute which made it a crime if one "publicly. . .treats contemptuously" the United States flag. *Id.* at 568.

In Texas v. Johnson, 492 U.S. 397 (1989), this Court stated that, if a statute was found to be related to expression, the Court would carefully probe to ensure compliance with constitutional requirements. Johnson, 429 U.S. at 402. A statute or regulation related to expression will be subjected to the "most exacting scrutiny." Johnson, 492 U.S. at 412.

In Johnson, the defendant was convicted of violating Texas' flag desecration statute because he unfurled a U.S. flag, doused it with kerosene, and set it afire as protestors chanted pejoratives toward the flag. The flag burning demonstration coincided with the 1984 Republican National Convention. As the Court pointed out, Johnson was not charged with stealing a flag, destroying someone else's property, trespass, disorderly conduct, or arson. Flag desecration, in this context, was burning the flag with an improper motive.

The Court examined Johnson's conduct to determine whether it was expressive, i.e., whether the conduct possessed sufficient communicative elements to bring the First Amendment into play. As its test, the Court looked at (1) whether there was an intent to convey a particularized message; (2) whether there was a significant likelihood that the message would be understood by those who viewed it; and (3) the context in which the conduct occurred. Johnson, 492 U.S.

at 404. The Court found that Johnson's flag-burning expressive conduct required First Amendment analysis.

Next, the Court looked to determine whether the state's regulation was related to expression. Johnson, 492 U.S. at 402. Texas argued that it had an important interest in protecting the flag as a symbol of nationhood and national unity. The Court found that the interest in protecting a symbol is indeed an interest in protecting the message conveyed by the symbol, which is a regulation related to expression. 492 U.S. at 409-410. Finally, after subjecting the statute to the "most exacting scrutiny," the Court overturned Johnson's conviction as violative of the First Amendment.

After Johnson, Congress passed the federal Flag Protection Act of 1989,[3] attempting to avoid the impact of that case by using more content-neutral terms. However, the content-neutral terms did not change the fact that the statute was attempting to regulate the meaning of a symbol. Further, the statute did not proscribe disposing of a flag when it became worn or soiled. Thus the statute was related to expression, and its broad scope reached free speech activities. For all these reasons, the Court overturned convictions brought under the Statute in United States v. Eichman, 496 U.S. 310 (1990).

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[3]103 Stat. 777, 18 U.S.C. § 700(a)(2)(Supp.1990)

E. The First Amendment Protects Wearing of Uniforms and Symbols

Even before Texas v. Johnson, lower federal and state courts had ruled regulations unconstitutional where they attempted to prohibit wearing of uniforms and emblems. The wearing of uniforms was upheld as symbolic expression protected by the First Amendment.

In a group of related cases, the National Socialist Party of America ("NSPA") planned to conduct a march in Skokie, Illinois, a suburb of Chicago with a large Jewish population. The marchers were planning to wear a uniform similar to the uniform worn by soldiers of the Third Reich, including an armband displaying a swastika. When NSPA announced its plans, Skokie officials obtained an injunction in state court to prevent the march. After the state courts refused to stay the injunction pending appeal, this Court ordered a stay. National Socialist Party of America v. Village of Skokie (NSPA), 432 U.S. 43 (1977). On appeal, the state appellate court ruled that the wearing of the uniform was a protected free speech right and could not be prohibited by injunction; but the wearing of the swastika was so offensive that it could be prohibited. NSPA, 51 Ill. App 3d 279, 366 N.E.2d 347 (1977). The state supreme court, however struck the entire injunction, holding that it violated the marchers' freedom of speech. The marchers were entitled to wear both the uniforms and the swastikas. NSPA, 69 Ill. 2d 605, 373 N.E.2d 31 (1978).

During pendency of the injunction appeals, the Village of Skokie adopted three ordinances to cover future marches.

One of the ordinances required permits for marches. A second ordinance prohibited display of clothing of symbolic significance that incites hatred. And a third prohibited public demonstrations by members of political parties while wearing "military-style" uniforms. Violation of the ordinances was punishable as a criminal offence. When the NSPA's application for a permit to march was denied, the NSPA sought injunctive and declaratory relief in federal court. The federal district court found the uniform ordinance "patently and flagrantly unconstitutional," citing Washington, supra., Tinker, supra., and Stromberg, supra. Collin v. Smith, 447 F.Supp. 676,700 (1978). On appeal by Skokie, the Seventh Circuit affirmed the district court's holding. 578 F.2d 1197 (7th Cir. 1978).

In a different context, the California Court of Appeals held that wearing the insignia of a motorcycle gang was an exercise of free speech. Renteria v. Dirty Dan's Inc., 198 Cal. App. 1447, 244 Cal. Rptr. 423 (1988). The court ruled, therefore, that it was a violation of a California anti-discrimination ordinance for Dirty Dan's night club to refuse service based on the fact that a person was wearing a motorcycle gang insignia.

II. THE ARIZONA COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT THE SUBJECT CODE IS NOT VOID FOR VAGUENESS OR OVER BROAD.

A statute which either forbids or requires doing an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Planned Parenthood of Central and Northern Arizona v. State of Arizona., 537 F.Supp 90, rev'd 718 F.2d 938, appeal following remand 789 F. 2d 1348, cross-appeal dismissed 107 S.Ct. 391, affirmed Babbit v. Planned Parenthood of Central and Northern Arizona, 107 S.Ct. 391, 479 U.S. 925, 93 L.Ed. 2d 346 (1982)(suit challenging vague language in appropriations bill).

The Arizona Court of Appeals stated that PETITIONER has no quarrel with the term "insignia," as that word is used in Code Section 23-21. Whether the Court's conclusion is entirely accurate as regards the PETITIONER'S fundamental void-for-vagueness argument, the Court went on to acknowledge PETITIONER'S assertion that the word "authorized," as used in the same section, is unconstitutionally vague. Ironically, in rejecting this argument and abruptly concluding that "its meaning is clear," the Court of Appeals relied on the Oxford English Dictionary, a scholarly, even recondite, work that most "men of common intelligence" do not even know exists.

At trial, PETITIONER testified that he "knew the regulations pretty well, the aps [special] orders and all, and I wasn't given any [instructions with respect to a retired officer wearing a shirt bearing police patches], nor have I been able to find any in any of the various manuals and everything that the [Phoenix Police] department issues to regular officers." Tr. 287. Indeed, when asked whether, to PETITIONER'S knowledge, there existed any "regulations, statutes, general orders, any authoritative

statements whatsoever," regulating what a retired Phoenix Police officer may or may not wear, PETITIONER replied, "there are none." Tr. 287-288. That PETITIONER was reduced to questioning as to whether he was "authorized" to display official police patches is scarcely to be wondered at.

When PETITIONER retired from the Phoenix Police Department in 1986, an official Phoenix Police badge was presented to him. Tr. 330. For some bizarre reason, PETITIONER'S possession and subsequent display of his official police badge was apparently "authorized" by the Phoenix Police Department, while his display of police patches was not. Small wonder that PETITIONER, a man of at least common intelligence, didn't understand whether wearing his "retirement uniform" was "authorized." His confusion in this regard was evident at trial when he testified that he "was never notified and didn't believe they [i.e., other retired police officers] were either, because I can't find anyone that was ever told what they should or should not do with that badge or uniform." Tr. 302. Despite the Court of Appeals' conclusion that "the defendant understood the word ["authorized"]," PETITIONER unequivocally testified at trial that, "I don't know if I understand the word authority." Tr. 300. Given the circumstances, who could blame him?

The Arizona Court of Appeals' observation that the word "authorize" is utilized in many criminal statutes is neither here nor there. The proper focus of inquiry is a common man's understanding of <u>this</u> ordinance, not of a hodge-podge of unrelated statutes.

The Arizona Court of Appeals, by

what amounted to little more that fiat, held that Code Section 23-21 is not void for vagueness. In so doing it erred, since its sweeping use of terms like "insignia" and "authorized" invite confusion, guesswork and, ultimately, anarchy.

Sabelko v. City of Phoenix, 846 F.Supp. 810 (D.Ariz 1994), provides a good example of a constitutional analysis of a Phoenix ordinance that was ostensibly "content neutral." The ordinance attempted to regulate demonstrations at abortion clinics. The court found the ordinance over broad, not narrowly tailored, vague, and that it vested unrestrained discretion in private citizens to restrict First Amendment Expression.

III. THE SUBJECT CODE WAS SELECTIVELY, AND UNCONSTITUTIONALLY, ENFORCED AGAINST PETITIONER, WHERE PETITIONER, A RETIRED/DISABLED POLICE OFFICER, WAS THE FIRST PERSON PROSECUTED AND HAD A HISTORY OF POLITICAL PROTEST AND LITIGATION WITH THE POLICE DEPARTMENT

The Fourteenth Amendment to the Constitution operates to prohibit arbitrary discrimination by the states against persons or classes in criminal cases. An individual's right to due process of law and to equal protection may be violated by the discriminatory administration of a law that is impartial on its face. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)(discriminatory application of laundry ordinance).

In addition to the facts that occurred at the gun show on December 11

and 12, 1994 (discussed above), testimony at the trial established that the wearing of the official Phoenix police insignia is fairly common in Phoenix and § 23-21 is rarely enforced. For example, Phoenix police officer RALPH GARRABRANTS testified that it was not unusual to see non-police wearing official insignia of the Department on T-shirts and other apparel. He personally witnessed a policeman's girlfriend wearing such insignia on a T-shirt, but he did not enforce City Code § 23-21. Tr. 224 et seq. Similarly, Sgt. MELVIN testified that he had encountered a person wearing the official patch of the DEPARTMENT, and he simply told the subject to go home with the apparel. Tr. 473-474.

Similarly, the testimony established that the wearing of the official Phoenix Fire Department insignia (equally prohibited by § 23-21) is fairly common in Phoenix and enforced even less than the prohibition against wearing police insignia. For example, Fire Department Captain MARK GODFREY testified that ex-battalion chiefs, no longer on official duty, wear with impunity their battalion chief jackets which have the official Phoenix Fire Department insignia on them. Tr. 246-248.

Phoenix Police Sgt. MUSIC testified at trial that it was not uncommon for citizens to be seen wearing police insignia, although he had enforced City Code § 23-21 on at least one proper occasion, but he had allowed the charged party to remove the police patches from the shirt rather than removing the entire shirt. Tr. 455-456. Sgt. MUSIC did not give PETITIONER that same option. Nor did Sgt. MUSIC give PETITIONER the option of covering up the patches. Tr. 104-108.

It appears, based upon the City's records, that PETITIONER is the only person who was ever prosecuted for violating City Code § 23-21. The disparity between enforcement of § 23-21 is explained by the motive of the Department against the content of PETITIONER'S political speeches. This motive was established by the testimony of the police officers themselves. Officer LUNDBERG testified that he was concerned that PETITIONER may be perceived as representing the views of the Department. Tr. 73. Likewise, Sgt. MUSIC testified that he was concerned that the public may believe that the Department supported PETITIONER'S view that the police supported their right to keep and bear arms. Tr. 112-113.

Unfortunately, this motive against PETITIONER'S views and his First Amendment expression did not begin with the December 11-12, 1993 gun show. During his tenure as a police officer PETITIONER began writing a political newsletter to policemen. The assistant Chief of Police told PETITIONER that certain police officials did not support the contents of the newsletter. Furthermore the assistant chief ordered PETITIONER to turn over the newsletter's mailing list. When PETITIONER refused on his First Amendment grounds, the assistant chief fired PETITIONER. However, on appeal to the Civil Service Board, PETITIONER was reinstated with full back pay, and the Police Department was admonished to stop the vendetta against PETITIONER and his First Amendment activities. PETITIONER was fired the second time by Chief DENNIS GARRETT, who was Chief of Police at the time of the December 12, 1993 arrest. Tr.

509-512.

CONCLUSION

This is a case bearing important First Amendment/political protest implications in which, PETITIONER, a political protester of national renown, has been:

1. Prosecuted for the use of a symbol as part of his political protest;

2. Prosecuted under a statute which, at best, is vague in its application to PETITIONER, a former police officer entitled to wear his "retirement badge";

3. Selectively and discriminately prosecuted for exercise of his First Amendment right for political protest and to petition the government for redress of grievances by his appeal of his discharge from the police department for exercise of his First Amendment rights.

PETITIONER requests that the court review his case as one of constitutional importance which affects all of those within the borders of the Unites States who dare exercise their First Amendment rights to protest government policies by thought, word or deed, including the wearing of military or police uniforms for purpose of theatrics, attention, emphasis, or mocking the subject of the protest.

Respectfully submitted this 27th day of May, 1997.

The MacPHERSON GROUP, P.C.

By _____

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APPENDIX A
Supreme Court State of Arizona

Supreme Court

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329
TELEPHONE: (602) 542-9396

February 28, 1997

RE: STATE OF ARIZONA vs. GERALD J. McLAMB
Supreme Court No. CR-96-0624-PR
Court of Appeals No. 1 CA-CR 95-0329
Maricopa County No. LC 94-00904

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 26, 1997, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to Court of Appeals, Division One, Phoenix, this 28th day of February, 1997.

NOEL K. DESSAINT, Clerk

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellee,	)	1 CA-CR 95-0329
	)	
v.	)	DEPARTMENT B
	)	
GERALD J. McLAMB,	)	
	)	
Appellant.	)	O P I N I O N
	)	

Appeal from the Superior Court of
Maricopa County
Cause No. LC 94-00904

The Honorable Bernard J. Dougherty, Judge

AFFIRMED

Roderick G. McDougall, City Attorney
by F. Tyler Rich, Assistant City Prosecutor
Attorneys for Appellee — Phoenix

Snell & Wilmer
By Steve C. Thornton
Attorneys for Appellant — Phoenix

E H R L I C H, Judge

Gerald J. "Jack" McLamb ("defendant") appeals from a judgment of the Maricopa County Superior Court affirming his conviction in the City of Phoenix

Municipal Court for a violation of Phoenix City Code ("Code") section 23021 proscribing the unauthorized wearing of the official insignia of the Phoenix Police Department. We have jurisdiction to determine the facial validity of this ordinance. Ariz. Rev. Stat. Ann. ("A.R.S.") § 22-375. Because we find that the ordinance is valid, the judgment of the superior court is affirmed.

FACTS AND PROCEDURAL HISTORY

The facts essential to the resolution of this appeal are not disputed. The defendant was a City of Phoenix Police Officer from 1976 through 1986 when he retired. At that time, he was given a Phoenix Police Department retired Officer's badge. The defendant also had what he called his "retirement uniform" which, in part, consisted of an official Phoenix Police Department shirt on which were shoulder patches with the official department insignia.

The defendant had long been involved in a number of political activities. For example, he was the publisher of a newsletter named *Aid and Abet* which was directed to law enforcement officers with the expressed purpose of "educating them concerning constitutional issues." In 1993, he helped form an organization called "Police Against the New World Order." This organization produced a manual, to which he contributed, called *Operation Vampire Killer 2000*.

On December 12, 1993, the defendant operated a booth at a gun show at the Arizona Veterans Memorial Coliseum in Phoenix. Over the booth hung banners declaring "Police Against the New World Order," "Police Support Your Right to Bear

Arms" and "We Will Not Take Your Guns Away." The defendant distributed his *Aid and Abet* newsletter and advertised the *Operation Vampire Killer 2000* manual. He wore his "retirement uniform" with the official Phoenix Police Department insignia shoulder patches, as well as his police department retired officer's badge and a whistle used by department motor officers. Visible in the defendant's booth was a police helmet. The defendant admitted that he wore the uniform to give weight and credibility to his political views. However, he maintained that he never represented himself to be an active police officer or a spokesman for the Phoenix Police Department.

The Phoenix Police Department received a complaint about the defendant's conduct in handing out political literature in a police officer's uniform. In response, Officers David Lundberg and Ted Music went to the gun show and saw the defendant in his attire. They advised the defendant that he could not wear the Phoenix Police Officer's badge nor the official Phoenix Police Department insignia shoulder patches because his unauthorized use of the badge and insignia violated the Phoenix City Code. The defendant refused to remove his shirt or, alternatively, to remove the patches, claiming that he had a First Amendment right to wear his "retirement uniform." He then was issued two citations, one for impersonating a police officer in violation of Code section 23-20 and one for wearing an official badge or insignia without authorization in violation of Code section 23-21.

The Phoenix Municipal Court dismissed the Code section 23-20 charge on the basis that it was preempted by state

legislation. The court also found that the defendant had not violated section 23-21 by wearing his retired officer's badge because the badge was not an official one. However, it found that the defendant had violated section 23-21 by wearing the shoulder patches with the official Phoenix Police department Insignia.

Following an evidentiary hearing on the defendant's claim of selective and discriminatory enforcement, the municipal court found that there was no such exclusive enforcement and that the defendant was guilty of violating Code section 23-21. It fined him $79.

The defendant appealed the conviction and sentence to the superior court, which affirmed the municipal court's judgment.

The defendant timely appealed to this court. He presents the following issues:

1. Whether his prosecution was impermissibly selective and discriminatory;

2. Whether Code section 23-21 is preempted by A.R.S. section 13-2406;

3. Whether Code section 23-21 is unconstitutionally vague;

4. Whether Code section 23-21 is unconstitutional because it violates the First Amendment to the United States Constitution;

5. Whether Code section 23-21 is unconstitutionally overbroad.

DISCUSSION

A. *Selective and Discriminatory Prosecution*

Our review is limited to the facial validity of Code section 23-21 because this action was instituted in municipal court and appealed to superior court. A.R.S. § 22-375; *State v. Phillips*, 178 Ariz. 368, 370, 873 P.2d 706, 708 (App. 1994). If the ordinance is facially constitutional, we have no jurisdiction to examine its application to the individual defendant. *Id.* Since the issue of selective and discriminatory enforcement involves only the implementation of the ordinance, we will not consider this issue.

B. Preemption

The City of Phoenix, as authorized by the Arizona Constitution, Article 13, Section 2, has adopted a charter permitting it to enact municipal ordinances. As a charter city, Phoenix may exercise "all the powers authorized by its charter, providing those powers are not inconsistent with the Arizona Constitution or the general laws of this state." *State v. Jacobsen*, 121 Ariz. 65, 68, 588 P.2d 358, 361 (App. 1978); *see* A.R.S. § 9-284.

The defendant argues that Code section 23-21 is preempted by A.R.S. section 13-2406, thus invalidating the ordinance. We disagree.

> The rule regarding preemption states: [B]oth a city and state may legislate on the same subject when that subject is of local concern or when, though the subject is not of local concern, the charter or particular state legislation confers on the city express power to legislate thereon; but where the subject is of statewide

> concern, and the legislature has appropriated the field by enacting a statue pertaining thereto, that statute governs throughout the state, and local ordinances contrary thereto are invalid.

Phoenix Respirator & Ambulance Service v. McWilliams, 12 Ariz. App. 186, 188, 468 P.2d 951 (1970)(citations omitted).

Section 13-2406(A) of the Arizona Statues provides:

> A person commits [the crime of] impersonating a public servant if such person pretends to be a public servant and engages in any conduct with the intent to induce another to submit to his pretended official authority or to rely upon his pretended official acts.

Section 23-21 of the Code provides:

> It shall be unlawful for any person to wear a fireman's or policeman's badge or insignia, or the badge or insignia of any public officer or inspector of the City when not properly authorized to wear such badge or insignia.

The ordinance bars the unauthorized use of a public officer's insignia on clothing. In contrast, the statute, with no mention of an insignia, prohibits the impersonation of a public servant engaging in "conduct with the intent to induce another to submit" to his faked authority. There is no conflict between Code Section 23-21 and A.R.S. section 13-2406(A).

The question remains whether the statute "has so completely occupied the

filed that it becomes the sole and exclusive law on the subject, leaving no room for any supplementary or additional local regulation." *Jacobsen*, 121 Ariz. at 69, 588 P.2d at 362; *see Prendergast v. City of Tempe*, 143 Ariz. 14, 691 P.2d 726 (App. 1984). Simply because the state and local legislation "touch upon a common element" does not mean that the ordinance is preempted. *Jacobson*, 121 Ariz. at 70, 588 P.2d at 363. An ordinance will not be found invalid if a reasonable interpretation of it avoids conflict with a statute. *State v. Crisp*, 175 Ariz. 281, 284, 855 P.2d 795, 798 (App. 1993). In the case of these two laws, there is no suggestion that the legislature intended to preempt the regulation of municipal insignias. *Id.* In passing its statute, the state's manifest purpose was to protect its populace from persons having the intent to persuade or cause innocent individuals to submit to simulated authority or to rely upon pretended "official" acts. The City of Phoenix, with a different purpose altogether, sought to regulate the use of indicia of its governmental authority.

C. Vagueness

The defendant argues that Code section 23-21 is unconstitutionally vague. He claims that it failed to give him adequate notice of how and when the ordinance would be enforced and under what circumstances the wearing of Phoenix Police Department insignia would be authorized.

When the law is challenged on the basis of vagueness or overbreadth, the appellate court has the duty of construing a law in such a manner that it will be

constitutional. *State v. Tocco*, 156 Ariz. 116, 119-20, 750 P.2d 874, 877-78 (1988); *State v. Lycett*, 133 Ariz. 185, 190, 650 P.2d 487, 492 (App. 1982). In this regard, the defendant has the burden of establishing the ordinance invalidity beyond a reasonable doubt. *Id.*; *State v. Steiger*, 162 Ariz. 138, 145, 781 P.2d 616, 623 (App. 1989).

"A legislative enactment is unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit standards for those who will apply it." *State v. Takacs*, 169 Ariz. 392, 394, 819 P.2d 978, 980 (App. 1991); *see State v. Tober*, 173 Ariz. 211, 214, 841 P.2d 206, 209 (1992); *Bird v. State*, 184 Ariz. 198, 203, 908 P.2d 12, 17 (App. 1995).

> The Constitution only requires that language convey a sufficiently definite warning as to proscribed conduct when measured by common understanding and practices. That there will be marginal cases in which it is difficult to determine the side of the line of which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. [Citation omitted.]

State v. Cota, 99 Ariz. 233, 236, 408 P.2d 23, 26 (1965). *See United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963). If a statute gives notice of prohibited conduct, it is not void for vagueness "simply because it may be difficult to determine how far one can go before the statute is violated." *Phillips*, 178 Ariz. at 370, 873 P.2d at

708 (quoting *Berenter v. Gallinger*, 173 Ariz. 75, 81, 839 P.2d 1120, 1126 (App. 1992).

The word "insignia" as used in Code section 23-21 has a well-established, common meaning which a person of ordinary intelligence would understand,[1] and the defendant does not challenge this word. Rather, he claims that the word "authorized" as used in the same code section is vague because the ordinance does not specify when a person is permitted to wear the insignia.

The *Oxford English Dictionary* (1971) defines the word "authorize" as "to give legal force to; to make legally valid; to give formal approval to; to give legal or formal warrant to (a person) to do something; to empower, permit authoritatively." *See also, Webster's New Universal Unabridged Dictionary* (2d ed.). Its meaning is clear.[2] The fact that the

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[1] The *Oxford English Dictionary* (1971) defines insignia as "distinguishing marks of office or honour." *See also, Webster's New International Dictionary* (2d ed.).

[2] The word "authorize" or its variants is founds in many criminal statutes. *See e.g.* A.R.S. § 13-1504(2) (unlawful to enter and look into residential structure without lawful "authority"); § 13-1803 (unlawful use of means of transportation is temporary "unauthorized" control over another's means of transportation); § 13-2104 (forgery of credit card is alteration of credit card without the express "authorization" of the issuer); § 13-2316(B) (computer fraud includes altering

defendant now contends that he did not know prior to being told by Officer Music that he was not authorized to wear the patches with the official Phoenix Police Department insignia does not render the word "authorize" unconstitutionally vague. Rather, the defendant understood the word but allegedly did not know that to wear the insignia was not permitted.

The defendant also claims that the word "authorize" is vague because it gives law enforcement officers discretion whether to enforce Code section 23-21. He illustrates his point by claiming that the spouses and children of Phoenix Police officers wear hats and shirts with the department badges and insignia at picnics or outings without allowance to do so but that they are not prosecuted. He concludes that this demonstrates that the ordinance is vague because the city can arbitrarily enforce it.

As a preliminary issue, there is the question of the defendant's standing to make this argument. A statute "must of necessity be examined in the light of the conduct with which a defendant is charged." *Nat'l Dairy Products*, 372 U.S. at 33.

> A defendant whose conduct is clearly proscribed by the core of the statute has no standing to attack the statute. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 610

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or destroying any computer without "authorization").

(1973).

Tocco, 156 Ariz. at 119, 750 P.2d at 877.

Proceeding nonetheless to address the defendant's argument, the ordinance sufficiently defines the behavior prohibited: wearing the insignia of any city officer when not properly authorized to wear such insignia. The code section does not apply to a replica, facsimile or other likeness of an insignia. Thus, interpretation of the ordinance is not dependent on the judgment of police officers. To the contrary, the ordinance "gives fair and objective guidelines to both potential offenders and law enforcement personnel" exactly what behavior is prohibited. *Phillips*, 178 Ariz. at 371, 873 P.2d at 709. Further, it must be supposed that public "officers will act fairly and impartially and in accordance with their best judgment," and a statute will not be held unconstitutional because of a supposed possibility they will not do so. *Brady v. Mattern*, 100 N.W. 358, 362 (Iowa 1904).

When the language is clear, the statue is not rendered unconstitutionally vague because there is a theoretical potential for arbitrary enforcement or the exercise of discretion by a law enforcement officer or prosecutor, or even if the conduct is prevalent and ignored. *Matter of Pima County Juvenile App. No. 74802-2*, 164 Ariz. 25, 29, 790 P.2d 723, 725 (1990). Indeed, statues that require some assessment by a law enforcement officer or prosecutor of the surrounding circumstances consistently have been upheld against vagueness challenges. For example, in *State v. Miller*, 398 S.E.2d 547 (Ga. 1990), the Georgia Supreme Court ruled constitutional an anti-mask statute

directed primarily at persons wearing Ku Klux Klan regalia. The defendant argued that the statute was vague and subject to arbitrary enforcement because, by its terms, it also prohibited wearing a ski mask in winter or sunglasses on a sunny day. Noting that the purpose of the anti-mask law was to prevent conduct provoking a reasonable apprehension of intimidation, threats or violence, the court concluded that the statute was no unconstitutionally vague because persons of ordinary intelligence could readily discern when behavior would or would not be criminal. *Id.* at 552. It gave as an illustration a person wearing a ski mask in winter who would not warrant alarm unlike a person wearing a mask in summer while entering a bank. *Id.* Measured by the standard of "common understanding and practice." *United States v. Petrillo*, 332 U.S. 1, 8 (1947), Code section 23-21 is not void for vagueness because it sufficiently warns against the proscribed conduct.

D. Violation of First Amendment

The defendant contends that the ordinance on its face violates his First Amendment right to free speech.[3] In

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[3] The First Amendment to the United States Constitution provides, in part, that there "shall" be "no law ... abridging the freedom of speech." While the defendant also refers to Article 2, section 6, of the Arizona constitution (the state counterpart to the First Amendment), because he only relies on cases interpreting the First Amendment, we do not separately discuss the Arizona Constitution.

support of his position, he relies on *Schacht v. United States*, 398 U.S. 58 (1970), wherein the defendant, wearing as a costume a United States Army uniform, participated in a skit protesting American involvement in Vietnam. He was convicted under a federal statute which made it a crime to wear a military uniform without authority to do so. A statutory exception provided, however, that an actor in a theatrical production "may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." The Court in *Schacht* was concerned solely with the last portion of the statutory exception, specifically stating:

> Our previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face. But the general prohibition of 18 U.S.C. § 702 cannot always stand alone in view of 10 U.S.C. § 772 which authorizes the wearing of military uniforms under certain conditions and circumstances including the circumstances of an actor portraying a member of the armed serves in a "theatrical production."

Id. at 61 (citations omitted). The Court held that the clause restricting authorization to those dramatic portrayals which do not "tend to discredit" the military was an unconstitutional abridgement of the freedom of speech. *Id.* at 62-63.

It is for that reason, though, that *Schacht* is distinguishable from this case.

In *Schacht*, the statute contained a content-based qualification on political speech. Such restrictions are subject to the most exacting scrutiny. *See Boos v. Barry*, 485 U.S. 312 (1988)(District of Columbia prohibition against displaying signs within 500 feet of embassy "bringing foreign governments in disrepute" was content-based restriction on political speech violative of First Amendment.). Code section 23-21, on the other hand, is, on its face, content-neutral. It prohibits the unauthorized wearing of an official insignia without regard to a particular expressive activity or the political viewpoint communicated by the wearer.

The defendant argues that to wear the insignia was a form of expressive speech integral to the spoken presentation of his political views. He relies on *Texas v. Johnson*, 491 U.S. 397 (1989), as well as a line of other United States Supreme Court flag-desecration cases and additional cases involving symbolic speech.[4]

In *Johnson*, the defendant was convicted of burning a United States flag contrary to a Texas statute making flag-desecration a crime. In reversing the conviction, the Court stated that,

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[4] *See e.g., United States v. Eichman*, 496 U.S. 310 (1990); *Spence v. Washington*, 418 U.S. 405 (1974); *Smith v. Goguen*, 415 U.S. 566 (1974); *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968); *Stromberg v. California*, 283 U.S. 359 (1931).

although the First Amendment encompasses both speech and expressive conduct, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Id.* at 406. In articulating when the state may regulate symbolic speech consistent with the First Amendment, the Court stated that, first, it must be decided if the conduct is indeed expressive. The test is whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). If the conduct is expressive, the court must next decide whether the state's regulation is "related to the suppression of free expression." *Id.* at 403. If the state's regulation is not related to expression, then the less-stringent standard for regulation of noncommunicative conduct controls as applied in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)(federal statute making it a crime to burn Selective Service card did not violate First Amendment). *Id.* If the state's regulation is related to expression, then the court determines whether the governmental interest justifies the conviction under a more "demanding standard" as applied in *Spence*, 418 U.S. at 414-415 (defendant displaying United States flag upside down with peace symbol on it engaged in constitutionally-protected activity). *Id.* at 403-04.

Wearing an official Phoenix Police Department insignia in the context in which the defendant was wearing it was expressive conduct. The defendant conceded that he wore the insignia in

order to convey a message that he was a former Phoenix officer advocating certain political ideas.[5] He also admitted that the insignia was intended to imbue his political beliefs with an aura of importance.

Since the ordinance is not related to the suppression of free expression, the less-stringent standard of *O'Brien* applies. A four-part test is used to determine when a governmental interest sufficiently justifies the regulation of expressive conduct:

> ... if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

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[5] The defendant, had he been still employed by the Phoenix Police Department, *nonetheless* would have been prohibited from wearing his uniform at the gun show to promote his political beliefs. "[N]o court has recognized a right to exploit one's rank in public employment solely for the purpose of enhancing credibility for personal or political gain -- in effect, to use the fact of public employment as a 'soap box' from which the employee can advocate a political position on an issue of public debate." *Thomas v. Whalen*, 51 F.3d 1285, 1291 (6th Cir.), *cert. denied* ___ U.S. ___, 116 S.Ct. 518 (1995).

391 U.S. at 377.

By its term, Code section 23-21 neither attempts to regulate or restrict the content of the defendant's expression, nor is it "directed at the communicative aspect of [the defendant's] conduct." *Bird* 184 Ariz. at 205, 908 P.2d at 19. It does not burden "core political speech," which then would prompt "exacting scrutiny." *See McIntyre v. Ohio Elections Commissions*, ___ U.S. ___, 115 S.Ct. 1511, 1519 (1995). Except for the city's bar to wearing an official insignia, the defendant is otherwise free to express his political views.

The City of Phoenix has a legitimate governmental interest in regulating the use of its official insignia. The police insignia has a "communicative force all its own." *Thomas v. Whalen*, 51 F.3d 1285, 1291 (6th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 518 (1995). Its unauthorized use jeopardizes the appearance of political neutrality and impartiality of the Phoenix Police Department and the city, particularly because the insignia is itself the imprimatur of authority.

Such governmental interest has been discussed in analogous cases dealing with statutes or regulations restricting the political and speech activities of government employees. The United States Supreme Court in *Unites States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973), recognized the interests of the federal government in restricting the political activities of its employees to maintain an appearance of neutrality.

In *Thomas v. Whalen*, 51 F.3d 1285, a police officer challenged on First Amendment grounds disciplinary action against him after he had made an

unauthorized appearance for the National Rifle Association while wearing his official uniform. The court found that the stat's interests outweighed the defendant's First Amendment rights. The defendant was free to express his ideas but he could not "exploit [his] rank ... for the purpose of enhancing credibility for personal or political gain." *Id.* at 1291.

In *Paulos v. Breier*, 507 F.2d 1383 (7th Cir. 1974), it was held that a police officer's First Amendment rights to publicly urge support for a political candidate were outweighed by the rights of the City of Milwaukee because "a municipality has [] interests in preserving the apolitical nature of its police force." *Id.* at 1385. In *Detroit Fire Fighters Ass'n, Local 334 v. City of Detroit*, 508 F.Supp. 172 (E.D. Mich. 1981), the court held that the First Amendment did not prevent the city from restricting the public appearances of uniformed firefighters to advocate defeat of a charter amendment.

The City of Phoenix has a legitimate governmental interest in restricting the use of its official insignia when the use serves to advance personal political views of the wearer. The city's tenable interest outweighs the individual's interest in advocating those views while wearing such an insignia. As in *O'Brien*, the governmental interest is important and substantial, and the interest is unrelated to the regulation of free expression. 391 U.S. at 376-77. Moreover, the restriction on free expression is minimal. "[A]ny impact on First Amendment rights is only incidental." *Bird*, 184 Ariz. at 205, 908 P.2d at 19. The ordinance does not violate the defendant's First Amendment

rights.

E. Overbreadth

As a related issue, the defendant argues that the statute is overbroad because it prohibits wearing official insignia without authorization under all circumstances, including at home, at social events, in photographs, dramatic presentations, video productions or satirical presentations, or during political protests. He argues that wearing the insignia in these situations is either harmless or directly infringes upon First Amendment rights of expression.

"An overbreadth statute is one designed to burden or punish activities which are not constitutionally protected, but ... includes within its scope activities which are protected by the First Amendment." *State v. Baldwin*, 184 Ariz. 267, 269, 908 P.2d 483, 485 (1995)(quoting *State v. Jones*, 177 Ariz. 94, 99, 865 P.2d 138, 143 (App. 1993)). The defendant's conduct does not come within the areas in which he claims the ordinance is overbroad. Thus, unless the challenged legislation, "by its terms, regulates the exercise of first amendment rights, its constitutionality may not be challenged on the ground that it might apply to parties not before the court." *Cacavas v. Bowen*, 168 Ariz. 114, 117, 811 P.2d 366, 369 (App. 1991).

This exception to the ordinary rule of standing has been carved out in the First Amendment area because of the very existence of an overbroad statute may have a chilling effect on the person s not before the court. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In *Broadrick*,

the Court found constitutional an Oklahoma statute prohibiting partisan political activities of state employees. Although the conduct of the employees challenging the statute fell within its core, because the statute covered potentially protected expression, the litigants were permitted to challenge its constitutionality. However, as noted by the Court, "... where conduct and not merely speech is involved ... the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep ... and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615-16. In *Broadrick*, the challenged statute validly prohibited many activities but it also forbade constitutionally-protected exercises. Nonetheless, the Court found that it was not necessary to discard the statute *in toto* and that improper applications of the statute could be dealt with as the situation arose. *Id.* at 618.

"[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). To claim "substantial overbreadth" is appropriate in cases when, "despite some possibly impermissible application, the remainder of the statute ... covers a whole range of easily identifiable and constitutionally prescribable ... conduct." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-65 (1984)(citations omitted).

> If the Court believes that the statute is so sweeping that it would deter persons from engaging in protected speech, or that the statute may be used on an arbitrary basis against political dissenters, the Court will strike the law as overbroad. If the Court believes that there is little chance that the statute will deter constitutionally protected speech, or will uphold the law and allow it to be applied on a "case-by-case" basis.

Ronald D. Rotunda & John E. Nowak, 4 *Treatise on Constitutional Law: Substance and Procedure 2nd*, § 20.8, p. 32 (1992). Thus, to prevail on an overbreadth claim, "[t]here must be a realistic danger that the statute will *significantly* jeopardize recognized first amendment protections of individuals not before the court." *Steiger*, 162 Ariz. at 144, 781 P.2d at 622 (citation omitted) (emphasis original); *see State v. Western*, 168 Ariz. 169, 812 P.2d 987 (1991)(ordinance prohibiting striptease performances substantially overbroad because prohibited broad range of legitimate artistic expression); *State v. Weinstein*, 182 Ariz. 564, 898 P.2d 513 (App. 1995)(theft-by-extortion statute substantially overbroad because it criminalized many "threats" common in everyday business).

The defendant relies on *Houston v. Hill*, 482 U.S. 451 (1987), and *Lewis v. New Orleans*, 415 U.S. 130 (1974), to support his claim that the ordinance is overbroad. In *Hill*, the ordinance prohibited speech that "interrupted a police officer in the execution of his duty." *Id.* at 455. In *Lewis*, the ordinance made it unlawful to use "obscene

or opprobrious" language toward a police officer. 415 U.S. at 132. Those cases are distinguishable because the statutes prohibited a wide range of protected speech.

Code section 23-21 is not substantially overbroad. The core of the ordinance regulates the wearing of official insignia and is directed at activities in which wearing such insignia compromises the appearance of neutrality and impartiality of the police, fore and other city department. The ordinance is not "a censorial statute, directed at particular groups or viewpoints." *Broadrick*, 413 U.S. t 616. There is not realistic danger that the ordinance will significantly infringe upon First Amendment rights, will deter constitutionally-protected speech or will be used selectively to punish dissenters. Accordingly, the law is not unconstitutionally overbroad.

Conclusion

For the reasons discussed above, we hold that Phoenix City Code section 23-21 is facially valid. We therefore affirm the judgment of the superior court and thereby affirm the defendant's conviction and sentence.

"s/Susan A. Ehrlich, Judge"

CONCURRING:

"s/Sarah D. Grant, Presiding Judge"
"s/E.G. Noyes, Jr., Judge"

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, vs. GERALD J. McLAMB, Defendant.	)	1 CA-CR 95-0329 DEPARTMENT B Maricopa County Superior Court No. LC 94-00904
	)	O R D E R

The above-mentioned matter was duly submitted to the Court. The Court has this day rendered its opinion.

It is ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the opinion, be sent to each party appearing herein or to the attorney for such party, and to the Honorable Bernard J. Dougherty.

DATED this 17th day of September 1996.

"s/Susan A. Ehrlich, Judge"